STATEMENT OF THE CASE

This cause arises out on an industrial related injury that occurred on March 01, 2000 at the Newco manufacturing facility in St. Charles Missouri. The plaintiff, Donald Shaffer, suffered a crush injury to his right hand, resulting in multiple digit amputations. Mr. Shaffer's hand was caught between the lower beam and the die on an Amada 5020 LD up acting press brake. The point where the lower beam and die meet is the "point of operation," the point at which metal is bent. Newco uses the press brake at issue to bend sheet metal for fabrication of automatic coffee makers.

At the time of his injury Mr. Shaffer was employed as a Service Engineer by Amada Engineering and Service Company. Mr. Shaffer was attempting to correct a problem with the lower beam at the time of injury. The lower beam, which rises to bend the metal between the beam and the die, was supposed to be adjusted so that it could only open far enough to allow a piece of sheet metal to be inserted between the beam and the die. The beam was opening approximately 4 inches at the time of the injury. The press brake was closed for use by Newco employees as it was considered unreasonably dangerous to operate the machine in the condition.

Mr. Shaffer brought an action based on strict product liability in the United States District Court for the Eastern District of Missouri against Amada America, Inc., importer and seller of the press brake in question.

Mr. Shaffer alleged that the press brake in question was unreasonably dangerous due to design and manufacturing defects, including, but not limited to: (1) lack of machine guarding, specifically either a mechanical guard to prevent the operator's hand from entering the space between the up acting beam and the press dies, or a light curtain that would deactivate the machine in the event that the operator's hand entered the space between the beam and the die; known as the "point of operation.," or the "die space"

the place where the metal is actually bent. (2) Mr. Shaffer also alleged that the design of the machine posed an unreasonable risk that a person attempting to adjust the bottom position of the lower beam; as he was doing, would lose his or her balance while standing on one foot and operating the treadle bar which activates the lower beam with the other foot; while standing directly in front of the machine; causing the person to either fall into the machine or grab the edge of the machine to regain balance. As the machine was not equipped with any type of guard, Mr. Shaffer alleged an unreasonable risk that the worker's hand would enter the die space and be crushed. Mr. Shaffer tendered Professor Amirouche, Ph.D. as an expert design witness.

Professor Amirouche testified, inter alia, that the press brake should have been equipped with mechanical guards which would have prevented the operator's hand from entering the "'point of operation" or sensory electronic devices (commonly used in the industry, called "light curtains," and in fact sold by the defendant as safety devices for the press brakes sold by defendant) which would have instantly stopped the machine in the event that the operator's hand entered the point of operation.

The District Court, without holding a Daubert hearing, granted Defendant's Motion in Limine to Exclude the Testimony and Opinions of Dr. Farid Amirouche. The District Court based its decision in part on the fact that Professor Amirouche had not designed a press brake, nor had he worked for a company that manufactured press brakes. Professor Amirouche had not personally designed the guards he recommended. He testified that such forms of guarding are commonplace. He is an expert in the field of electronic sensors, and in his experience such devices can be readily adapted to all types of machinery. He further testified that while he had not designed a mechanical guard for the machine at issue, he could do so if requested.

The District Court held that the expert testimony of plaintiff's tendered safety expert, Professor Mandara Savage, Ph. D., without Professor Amirouche's testimony, was not sufficient to establish a question of material fact. Dr. Savage testified that the necessity to service the machine while it was energized caused an unreasonably dangerous condition , and was in violation of Occupational Health and Safety Administration (OSHA) Standard 29 CFR 1910.147 which requires the machine to be isolated from the energy source and rendered inoperative while service is performed. The District Court did not comment on the testimony of Amada's retained expert who identified the forms of guarding recommended by Professor Amirouche as types of guarding which could be used on the press brake at issue. The District Court did not comment on the testimony of Amada employees who stated that they had installed numerous light curtains on Amada press brakes and saw no reason why such devices would not work on the machine in question.

PURPOSE OF THE MOTION

Petitioner seeks appropriate sanctions for the defendant's conduct in making an obviously false statement and accusation to the Court. Specifically, on page 25 of Amada's **Brief in Opposition to Petition for Writ of Certiorari** defendant states:

> "As argued to the District Court and the 8th Circuit , Petitioner alleges that the mere fact that the Press Brake lacked certain guards constitutes evidence of a defective condition. *Swe e.g.*, Petition pp. 17, 25 (listing various guards allegedly available for the Press Brake)"

The foregoing is basically true . The following footnote is nothing more than a bald faced lie>

> "The record indicates that the Press Brake was indeed equipped with guards ." As such , not only is Petitioner's argument without merit, it is also inaccurate and misleading.

PURPOSE OF THE MOTION

Petitioner seeks leave to file an exhibit, which, to the best of Petitioner's knowledge, did not exist at the time of filing of the Petition for Writ of Certiorai in the above cause, and if it did in fact exist, it was not known to counsel.

The exhibit in question is an advertisement for a foot switch sold by the defendant, Amada America, Inc; as a retrofit device. The foot switch offers an alternative method of activation of Amada power press brakes, including the Model RG 5020LD, which is the model at issue in the instant case.

The record in the instant case contains a copy of a previous advertisement by Amada America, Inc. for electro pneumatic foot switches to be used with Amada press brakes, including the press brake at issue. In the new exhibit offered Amada America states :

> Foot Switches
>
> > Amada Engineering stocks a wide array of foot for all press brake models such as RG, FBD and HFB These include retrofit switches which will add versatility to your press brake for staging or Dual Operator operations. Reduce Operator fatigue while **increasing safety of the bending operation. (emphasis added)**

ARGUMENT

Reasons to Allow Motion for Sanctions

There is no evidence of record to indicate that the Pesss Brake at issue was equipped with any Guard whatsoever. The photographs and video tape taken by a professional photographer at

the defendant's request at the Newco facility at the time of Professor Amoirouche's inspection of the machine in question, at which defense counsel and defendant's expert were present, verifies that no guards were in place. The parts list, defendant's Exhibit 5? Deposition of Farid Amirouche identifies a "rear guard" which has nothing to do with the point of operation, which is where the plaintiff was injured .

No claim of guards in place has been made in either the District Court of the Appellate Court for the simple reason that no guards were in place on the machine at any relevant time.

Mr. Shaffer , in the document entitled "my description of the accident, quoted in part by defendant in its **Brief in Opposition** at p. 4 ; states that one of the reasons for Mr. Shaffer's injury was lack of a safety barrier such as:

> "a light curtain or a mechanical guard or anything to keep somebody from putting there hand in there." (Donald Shaffer deposition pp. 165, 1666 Defendants Separate Appendix Volume II 0302)

Mr. Shaffer further testified that he did not lay his hand on the ram and become distracted. He did not know how his hand came to be in the point of operation he did not know it was there until after it was crushed. The only ways he could think of to account for his hand being where it was would be he became distracted or lost his balance. (Defendant's Appendix Volume II pp. 0300, 0301 , 0327

Mark Herbert ,Newco Press Brake Operator , felt that the condition that Don Shaffer was trying to repair, the failure of the lower beam to lock in the correct position; caused an unsafe condition. At the time of Mr. Shaffer's injury it was impossible to adjust the position of the lower beam in the desired manner; as it was falling to the lowermost position. (Herbert dep. p. 82 Exhibit Appendix p. 129) The press brake had been shut down prior to Mr. Shaffer's

attempt to cure the problem. It was felt to be unreasonably dangerous due to the excess space between the beam and the die, which allowed room for a person's fingers to enter the space between the beam and die. (Herbert deposition p. 82. Exhibit Appendix p. 129).

In order to perform the repair that Mr. Shaffer was attempting to perform the machine had to be in an operational mode; it could not be disconnected from the power source. (Exhibit 3 excerpt from Amada service manual, Appendix pp. 12-14, Don Shaffer Deposition pp. 171, 172. Exhibit Appendix p 206).

In order to adjust the lower position of the lower beam Mr. Shaffer had to press and hold the bar pedal (treadle bar) to raise the lower beam. He then released the treadle bar to allow the lower beam to drop to the desired position. He then turns a lever called the Handwheel, which is located on the left side of the machine 26" above the floor, downward to lock the lower beam position. (Plaintiff's Exhibit 3 excerpt from Amada Operators Manual, Appendix pp. 12-14. Exhibits 4-8 pictures illustrating the process, Appendix pp. 45-49) (Don Shaffer deposition pp. 171, 172, Exhibit Appendix p. 206) Mark Herbert was standing beside the plaintiff, not behind him when the injury occurred as the defendant has alleged in its Motion for Summary Judgment.

> Q. Where were you standing at the time of the accident?
>
> A. Directly to his right. Right in front of the machine. I was not looking over his shoulder. We were shoulder to shoulder...He was on my left side, and I was leaning over looking at the mechanism in question, the stop mechanism. The only thing I could see from my peripheral vision was like Don's legs and his left hand. I could tell by the mechanism and the ram that he had run it through. I don't know if it was completely through the strokes, but he had the ram moving and it had moved I'd say four or five times in an up and down motion. And at

the time that he was injured, I didn't know where his right hand was at all because that was out of my peripheral vision. But his left hand had--The ram was moving in an upward position and he had pushed the lock lever down to lock the ram into place.....

A. Okay. The ram was closing or coming up and he had pushed the lock lever down, and that was when I heard him scream. I assumed at first that he had maybe pinched his finger when he pushed this lock lever or something, and I jumped. I was startled. He had screamed, and I stood up. And then when I stood up, I looked at him and he took his left hand and cupped his right hand. And when he did that I saw the blood coming from his fingers. (Mark Herbert deposition pp. 57, 58, 59, 60, Exhibit Appendix pp.124-126)

REASONS TO ALLOW MOTION TO SUPPLEMENT THE RECORD

Petitioner's tendered expert design witness, Professor Farid Amirouche, testified that one of the defects in the press brake was the use of a treadle bar which is located on the front of the machine nine inches above the floor, as a means of activation of the press brake machine. Professor Amirouche testified that the treadle bar, which has approximately four inches of free travel before the process of activation begins, is dangerous and unreliable as a means of foot support. Professor Amirouche believed that Mr. Shaffer lost his balance, grabbed the machine, unfortunately in the space between the 55 to ram and the die where metal is bent, and shifted his weight to regain balance, thus activating the machine by depressing the treadle bar. As a result Mr. Shaffer suffered multiple amputations of his right fingers.

Defendant's retained expert, Peter Schwalje, concurs in the opinion that Mr. Shaffer grabbed the machine in an effort to regain stability.

Professer Amirouche stated, inter alia:"

"In my opinion, the Brake press treadle bar is dangerous and unreliable. It is haphazardly controlled, and provides a dangerous mechanism for foot support.

I certainly believe that if a foot electric/pneumatic switch had been in use Mr. Shaffer wouldn't have had his fingers crushed and would still have his hand today. Furthermore, the press brake should have built-in safety guards of a mechanical/sensory nature that would prevent such accidents from occurring. "

"Mr. Shaffer demonstrated to me, how the brake press operates. He stood with one foot on the ground and the other on the treadle bar. The right foot that barely was in contact with the straddle bar was maintained in space when the ram was not activated. I was able to observe the operator on the same machine earlier performing the same task. It became apparent to me that the operator is standing on one foot while having the other foot on and off the treadle bar. Given the fact that there is no resistance on the treadle bar for over four inches, there exists a strong possibility for anyone not trained on posture and stability to lose balance. Any distraction such as turning around to answer a question or reach for a tool would initiate an instability causing the person to try to regain posture and stability. The latter is achieved by grabbing into something while trying to readjust the body to regain the equilibrium position.

A rigorous training will be needed to avoid catastrophic accident. To my knowledge, there are no Press brakes currently operational nationwide without a foot electric switch. The electric/pneumatic foot switch allows the operator to have his/her foot on the ground at all times, providing the support and balance needed at the job. (Amirouche Report)

The offered exhibit indicates that defendant, Amada America Inc., concurs with Professor Amirouche's opinion that a foot switch is a safer design alternative to the treadle bar. Amada's design expert, Peter Schwalje, stated in his deposition that Cincinnati and Amada were the only manufacturers of press brakes known to him to market a press brake with a treadle bar means of activation as opposed to a foot switch as of September 24, 2002 the date of his deposition. He did state that he had not recently looked to see " whats here today" He also stated that he was aware that Amada offered foot control devices as an optional means of activation at the time the press brake at issue was sold . (Deposition of Peter Schwalje, pp.93, 96, Mr. Schwalje was also aware that light curtains were commonly offered as options by various manufacturers, he had not made a study of all manufacturers but based his opinion on sales documents that he had seen . (deposition pp. 97 98 .)

Amada employee, Themis Alexopolulos, Regional Service Manager, testified that as an area service engineer he had installes12 to 15 foot switches on Amada press brakes. He worked as an area service engineer from June 17, 1985 until approximately April 1998. A service engineer installs and repairs Amada equipment. He is aware that the RG 5020 LD press brake, at issue in the instant case, can be operated by a foot control switch. He identified a light curtain as device which can be used as a point of operation guard on an Amada press brake. He had installed light curtains on Amada press brakes. Themis Alexopoulos deposition pp. 6, 7, 21, 22, 24,)

The admission of the tendered exhibit into the record would further support plaintiff's position that the safety devises identified by Professor Amirouche are widely accepted in the industry. Professor Amirouche's opinions meet the *Daubert* tests for general acceptance and peer review due to the wide general acceptance in the industry of the safety devices he has identified. The defendant itself, along with other manufacturers, sells and installs at least two of the safety devices identified by Professor Amirouche. As far as the *Daubert* factor of testing it

is clear that the safety devices advocated by Professor Amirouche have been widely tested in the market place. Foot switches and light curtains are commonly offered by various manufacturers of press brakes. OSHA standards and American National Standards Institute standards recognize these types of guarding.

The District Court clearly abused its discretion by holding that Professor Amirouche's opinions were inadmissible do to the lack of sufficient facts and data to support them. The District Court clearly abused its discretion by holding that Professor Amirouche offered "laundry list of abstract ideas."

For the reasons and authorities cited above this Honorable Court should Grant Petitioner's Motion to Supplement the Record. Petitioner prays this Honorable Court to impose such sanctions as the Court deems just and proper for Defendant's action in making obviously false and misleading statements to the Court regarding the presence of guards on the press brake at issue.

Respectfully Submitted
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TABLE OF APPENDICES

Order Entered September 10, 2003 United States Court of Appeals for the Eighth Circuit
p. 1-4

Memorandum and Order Entered January 6, 2003 United States District Court for the Eastern District of Missouri Honorable Catherine D. Perry
pp. 5-17

Judgment entered January 6, 2003 Honorable Catherine D. Perry
United States District Judge
p. 18

Exhibit Amada Foot Switches
p. 19

Picture of machine with Petitioner's hand in the point of operation taken at inspection p.20

Picture of front of machine showing no guard present illustrating UNGUARDED open apace between beam and die at point of operation p. 21

Amada Advertisement for Guarding Devices p. 22

UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

No. 03-1388

Donald Shaffer,	*	
	*	
Appellant,	*	Appeal from the
V.	*	United States
	*	District Court for
Amada America, Inc.,	*	Eastern District
	*	of Missouri
Appellee.	*	[UNPUBLISHED]
	*	

Submitted : September 10, 2003

Before: WOLLMAN, FAGG and RILEY,

Circuit Judges:

PER CURIAM.

Donald Shaffer, a service engineer for Amada Engineering and Service, Inc., crushed his fingers while repairing a press brake machine, which bends metal. Shaffer brought this diversity action against Amada America, Inc., (Amada) , the press brake's seller, alleging the press brake was defectively designed. to prove defective design, Shaffer proffered the testimony of Farid Amirouche, a doctor of mechanical engineering. The district court* granted Amada's motion in limine to exclude Dr. Amirouche's testimony under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharm.,

Inc. 509 U.S. 579, (1993). Without expert testimony to prove the press brake was defective, the district court granted summary judgment to Amada. Shaffer appeals asserting the district court should not have excluded Dr. Amirouche's testimony.

We review the exclusion of expert testimony for abuse of discretion. Jaurequi v. Carter Mfg. Co. 173 F. 3d 1076, 1081 (8th Cir. 1999). Expert testimony is generally admissible when it is reliable and relevant. *Id:* Fed. R. Evid. 702. District courts have considerable latitude in deciding whether expert testimony meets this standard., and in doing so, may consider one or all *Daubert* factors. 509 U.S. at 593-94; see Jaurequi, 173 F. 3d at 1082. The polestar is the scientific validity of the principles underlying the expert's opinions. Jaqueri, 173 F. 3d at 1082.

* The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri

Dr. Amirouche would have testified the press brake's treadle bar is dangerous and unreliable, a foot electric/pneumatic switch should be used, and the press brake should have built in safety guards of a mechanical /sensory nature to prevent accidents from occurring. Dr. Amirouche based his opinions on his experience as professor and researcher in the area of mechanical engineering design and biomechanics for over twenty years. He relied on Shaffer's statement about the accident, an OSHA press release about reducing power press injuries, Safety Lines information on brake presses, Amada operating manuals, medical records, hand photographs, pictures of the press brake, video of the press brake, the Amada Engineering Elector pneumatic foot switch, and publications about injuries resulting from fingers being crushed by a press brake. The district court concluded Dr. Amirouche's testimony was unreliable, however, because the testimony was not based on sufficient facts and data. He had not designed or tested the devices he claimed would have prevented the accident, there was no peer review of his theories , and there was no evidence of the general acceptance of his abstract theory that certain devices would have

prevented the accident. See Daubert 509 U.S. at 593-94.

The district court did not abuse its discretion in excluding Amirouche's testimony. The record shows Amirouche has no experience with press brake designs, he has been a full-time professor since 1984, and he has never designed a press brake, a press brake guard, or an electro-pneumatic foot switch for a press brake. Although Amirouche identified a switch that could be used on a press brake, the switch could not be used on the press brake at issue and was not used on any press brake. Further, Amirouche has never tested press brakes or published any articles or research about press brakes. Indeed, Amirouche could not identify any code or standard applying to the design, manufacture, service, or operation of press brakes. Shaffer's industrial safety expert proffered testimony identifying the applicable design standard, but admitting that the press brake at issue met the standard's requirements. Given Dr. Amirouche's lack of design experience or expertise involving press brakes, the district court properly excluded Dr. Amirouche from testifying that the press brake was defectively designed. See Anderson v. Raymond Corp., No. 02-3393, 2003 WL 21919577, at * 2(8th Cir. Aug. 13, 2003) ; Oglesby v. General Motors corp. 190 F. 3d 244, 250-251, (4th Cir. 1999) ; Ancho v. Pentek Corp; 157 F. 3d 512, 518 (7th Cir. 1998)

Shaffer also contends that even if the district court did not abuse its discretion in excluding Dr. Amirouche's opinions, the district court committed error in granting summary judgment to Amada because Missouri law holds the failure to guard may be a design defect. Although a press without proper guarding may be unreasonably dangerous, Murphy v. L& J Press Corp. 558 F. 2d 407, 411 (8th Cir. 1977) Shaffer still had the burden to prove the design was unreasonably dangerous, Pree v. Brunswick Corp. 983 F. 2d 863, 865, (8th Cir. 1993) To do so, Shaffer must show there is a safer alternative design for the press brake that injured him. Dancy v. Hyster Co.

127 F. 3d 653-54 (8th Cir. 1997) Shaffer cannot make this showing without expert testimony. Id. Halving properly excluded the testimony of Shaffer's only design expert, the district court properly granted summary judgment to Amada.

We thus affirm the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD SHAFFER,	)	
	)	
Plaintiff,	)	
	)	CASE NO:
vs.	)	4:01CV1767 CDP
	)	
AMADA AMERICA, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

In March 2001, Donald Shaffer, a service engineer for Amada Engineering and Service[1], Inc., was injured while servicing a brake machine at the Newco Company's St. Charles, Missouri plant. As Shaffer was adjusting lower ram position of the up-acting press brake, the Amada model RG5020LD, somehow his right hand came between the lower ram of the machine and the upper die. As the machine cycled upward, Shaffer's fingers were crushed. He evidentially lost multiple fingers.

Shaffer sued Amada America, Inc., the seller of the press brake, claiming that it was defectively designed. Both parties retained experts, and both parties have filed motions in

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[1] Amada Engineering merged with defendant Amada America, Inc. in July 2001, after the accident.

limine to exclude certain testimony offered by these experts. Additionally, Amada America has moved for summary judgment. For the reasons discussed below, I will grant Amada America's motion in limine with respect to Farid Amirouche – Shaffer's only expert witness regarding defective design of the press brake – and, as a consequence, I will also grant Amada's motion for summary judgment.

I. Facts

On March 1, 2000 Donald Shaffer went to the Newco Company's plant in St. Charles, Missouri, to repair a broken control switch on one of Newco's newer machines, the Amada model RG5020LD. After Shaffer finished this task, he was asked by Newco employee Mark Herbert to fix another problem with the machine. Herbert told Shaffer that the lower ram on the press brake was slipping from its lower set point.

Shaffer went through several cycles of the machine to examine the problem, using the treadle bar (a bar located at the base of the machine which is depressed in order to start the cycling of the press brake). Mark Herbert was standing behind him looking over Shaffer's right shoulder. At some point, plaintiff was injured when his hand and several of his fingers were caught between the lower ram and the upper die.

Shaffer has made several statements, but he cannot remember exactly how the accident happened. Eyewitnesses and Amada employees to whom Shaffer recounted the

events are similarly uncertain of exactly how Shaffer's hand got between the ram and the die.

Shaffer retained Dr. Farid Amirouche as an expert witness. Dr. Amirouche is prepared to testify to the following six opinions:

1. The treadle bar of the machine is dangerous and unreliable because there is excessive "Travel" in the bar that leads to operator instability.
2. The ram should have some sort of support built into the front of it, such as a ledge or a platform that extends outward, on which plaintiff could have rested his hand.
3. A foot operated electric or pneumatic switch would have prevented the accident because it would not have excessive "travel" like the treadle bar and because it could be moved farther away from the machine.
4. Safety guards of a mechanical/sensory nature would have prevented the accident. Examples of mechanical guards would be a block or a steel rod to place in the machine while it is being serviced to prevent the ram and die from closing. Examples of sensory guards would be a "light curtain" or a force-field that would detect the presence of a foreign object in the press and cause it to stop.

5. A safety manual should have been provided to Shaffer before the accident.[2]
6. Plaintiff's accident must have happened because he lost his balance with his foot on the treadle bar and then placed his hand on the lower ram in order to steady himself.

Dr. Amirouche has a Ph.D. in Mechanical Engineering and has for approximately twenty years taught courses such as Mechanical Engineering, Design, and Biomechanics at the University of Illinois at Chicago. He has written a recently-updated book called Principles of Computer-Aided Design and Manufacturing, but he admits that the pertinent chapters of his book focus more on computer-automated press brakes, rather than on operator-run brakes, such as the RG5020LD.

Dr. Amirouche has limited experience with press brakes. He operated a press brake perhaps four or five times during the course of his undergraduate engineering studies in 1977. Also while in school, in 1979, he saw a press brake being operated. He has never conducted any research on press brakes or guards for press brakes independent of this litigation. At a conference for the National Institute of Health and Safety in 1999, Amirouche participated in a

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[2] Plaintiff has never pleaded a failure to warn theory. As a result, I will not address this opinion of Dr. Amirouche. Additionally, the evidence indicates that a manual was attached to the machine, but the expert was not aware of that when he wrote his report.

committee meeting that spent about 45 minutes discussing press brakes over the course of the two-day conference. Dr. Amirouche has not published any articles regarding press brakes.

II. Defendant's Motion in Limine Dr. Amirouche

Shaffer has proffered the testimony of Dr. Amirouche, to prove the defectiveness of the press brake. Amada has moved to exclude all expert testimony offered by Dr. Amirouche under Rule 702 and the requirements of Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579 (1993). Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid.702.

Under Daubert, the Court must determine whether the reasoning and methodology underlying the proposed expert's testimony is valid. Peitzmeier v. Hennessey Indus., Inc., 97F.3d 293, 297 (8th Cir. 1996). In making this inquiry, Daubert offers four non-exclusive factors: (1) whether the concept has been

tested, (2) whether the concept has been subject to peer review, (3) what the known rate of error is, and (4) whether the concept is generally accepted by the community. Daubert, 509 U.S. at 593-95.

Dr. Amirouche fails the Rule 702 and Daubert requirements for admissibility of expert testimony. First, Dr. Amirouche's testimony is unreliable. It is not based on sufficient facts and data. Dr. Amirouche has virtually no experience with press brakes, other than his participation in a forty-minute discussion of press brakes during a two-day conference, and the limited experience he had during his undergraduate studies approximately 25 years ago. Although he reviewed some information about press brakes on the internet, none of that information provided a basis for his opinions.

Second, Dr. Amirouche has not designed or tested the devices he claims would have prevented Mr. Shaffer's accident. He has not even sketched any of these possible alternative designs. He has no knowledge as to whether any of his proposals would work or would interfere with the normal operation of the press brake. Similarly, Amirouche offers no quantifiable evidence to support his theory that excessive "travel" in the treadle bar caused the accident. He has simple made on-site measurements that he recorded in a one-page hand written note, purporting to show the "travel" but not trying that "travel" to any cause of the accident.

Third, there has been no peer review of Dr. Amirouche's theories of alternative design. Because there has been no testing of the

alternative designs, we also do not know the potential rate of error. Finally, there is no evidence of the general acceptance of Amirouche's abstract theory that his laundry list of devices would have prevented the accident.

Shaffer claims Dr. Amirouche is similar to the expert who was admitted in Lauzon v. Senco Prods., 270 F.3d 681 (8th Cir. 2001), which involved an allegedly defective nail gun. In Lauzon, the expert conducted various scientific tests in arriving at his opinion that the nail gun was defective – he measured the trigger force of the gun and the nail speed from various distances, conducted a pendulum test to measure recoil forces, and recreated the roof where the accident occurred. Id. At 688-89. Moreover, the plaintiff's proffered expert published an article about the allegedly defective nail gun in the Journal of the National Academy of Forensic Engineers. Id. At 690. He also consulted two specific articles regarding nail gun injuries and the alternative design he was advocating.

Dr. Amirouche stands in stark contrast to the controverted expert in Lauzon. The extent of his examination of the actual machine, as well as the information gathered from Newco employees regarding the normal operation of the press brake during his only visit to the Newco plant, covered only one handwritten page of notes. It is estimated that this visit to the Newco plant took only ninety minutes.

Amirouche lacks even a comprehensive understanding of how the press brake at issue works. For instance, Amirouche does not know where the press brake's "on/off" switch is

located. He does not know what mechanism is actuated by use of the treadle bar – which he claims is defectively designed and unreasonable dangerous. Amirouche Depo. At 246 (I did not really look at that machine in particular, finding out whether it's a gear system or hydraulic system, electrical system, motor of some sort that actually keep – you know, moves it, you know."). Dr. Amirouche admits that the only literature he consulted specific to the press brake at issue in this case was the operator's manual and the parts list. He did not test his theories to see whether the general safety measures he proposes would actually work on the RG5020LD without altering the purpose for which the machine is used (bending coffee pot component parts). Moreover, unlike the Lauzon expert, Dr. Amirouche made no attempt to either quantify his findings of excessive "travel" in the treadle bar, like measuring the force required to activate the machine. Nor has he subjected his "research" – which was almost exclusively documents he gathered from the Internet solely for the purpose of this litigation – and assorted theories of alternative design to peer review. The fact that Dr. Amirouche is a professor and an engineer does not grant him license to label as "scientific" unsubstantiated or overly broad opinions.

Despite Shaffer's protestations, Dr. Amirouche is similar to the experts in several cases that were mentioned in Lauzon. For instance, in Jarequi v. Carter Manuf. Co., Inc., 173 F.3d 1076, 1080 (8th Cir. 1999), the Eighth Circuit affirmed the exclusion of the plaintiff's proffered expert who attempted to testify that the

corn head on a combine was defective because it lacked "awareness barriers" that warned of the hazard zone where the gathering chains of the combine emerged from the snout of the machine. The expert did not study the feasibility of this idea, much less design or test it. Id. He was unaware of any study regarding the effectiveness of such a barrier or of any manufacturer incorporating such an idea into a finished product. Id. As with Dr. Amirouche's proposals, the Jarequi expert did not "construct or ever draw the suggested device, much less test its utility as a safety device or its compatibility with the corn head's proper function." Id. At 1084. (8th Cir. 1996), the district court excluded the proffered testimony of an expert who wished to testify that a tire changing machine was unreasonably dangerous. The proposed expert opined that the tire changing machine acted as a "launch pad" for an overinflated tire, an effect that he said could be reduced with several changes he proposed. Id. However, like Dr. Amirouche, the expert had neither designed nor tested the proposed design for safety or utility although (unlike Dr. Amirouche) he had drawn some rough sketches. Id. These sketched were not adapted into engineering drawings, much less actual prototypes. Id. Again, similar to Dr. Amirouche's proposed changes, none of the Peitzmeier expert's proposed changes were subject to peer review. Id. The Eighth Circuit affirmed the district court's decision to exclude the expert's testimony. Id. At 298. See also Dancy v. Hyster Co., 127F.3d 649 (8th Cir. 1999) (Affirming exclusion of expert testimony that forklift used by

defendant should have a guard where expert had not tested his theory or designed the alternative guard).

Because I find that the proposed testimony of Dr. Farid Amirouche does not satisfy the requirements of Rule 702 and cannot survive a Daubert challenge, I will grant Amada' motion in limine and exclude his testimony.

III. Summary Judgment Motion

In determining whether summary judgment should issue, the Court views the facts and inferences from the facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving party has the burden to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P.56©; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in its pleadings but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material facts exist. Fed.R.Civ.P.56(e). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323.

Missouri law requires Shaffer to prove the following elements: (1) Amada America sold the press brake in the course of its business; (2) the press brake was in a defective condition that

made it unreasonably dangerous when put to a reasonably anticipated use; (3) the press brake was used in a manner reasonably anticipated; and (4) Shaffer was damaged by the defective condition that existed when the product was sold. Rauscher v. General Motors, 905S.W.2d 158, 160 (Mo. Ct. App. 1995). Amada America has shown that the record is devoid of any admissible evidence as to the second element – that the press brake was in a defective condition that made it unreasonably dangerous to operate. Because of this complete failure of proof of an essential element, Amada is entitled to judgment as a matter of law.

Plaintiff has filed depositions of Amada Engineering employees James Donald Rush, John Porco, and Themis Alexopoulos. These additional filings do not establish the defectiveness or unreasonable dangerousness of the RG5020LD press brake that Mr. Shaffer was repairing the day he was injured. The Alexopoulos and Rush depositions do establish that Amada offered some extra guarding devices at the time the RG5020LD was sold to Newco, but it does not follow from this evidence that the RG5020LD is defective without these devices or that they would have prevented the accident that occurred here.

The law is not so rigid as to require a manufacturer to sell only those products equipped with every available safety device. Linegar v. Armour of America, Inc., 909 F2d 1150, 1154 (8th Cir. 1990). And the absence of an available safety feature does not, by itself, mean a product is defective. Missouri law, instead, "demands that we focus our efforts on

defects that are unreasonably dangerous." Sandage v. Bankhead Enterp., Inc., 177 F.3d 670, 673 (8th Cir. 1999).

This is not a case like Patterson v. Foster Forbes Glass Co., 674 S.W.2d 599 (Mo. Ct. App. 1984), where the circumstantial evidence presented would allow a jury to find defect without expert testimony. In Patterson, a baby bottle exploded, sending shards of glass that severed tendons in a mother's hand. Id. At 601. This case is not so simple.

This case involves a complex piece of industrial machinery. Because a finding of defect cannot rest on conjecture or speculation, Crump v. MacNaught P.T.Y., Ltd., 743 S.W.2d 532, 534 (Mo.Ct.App. 1987), Shaffer needs competent expert testimony to establish that this press brake is defective and unreasonably dangerous. Without expert testimony, we are left with evidence of an accident. The fact that an accident happened, standing alone, does not establish a case of product defect. Winters v. Sears, Roebuck, & Co., 554 S.W.2d 565, 571 (Mo.Ct.App. 1977).

Plaintiff's remaining expert, Dr. Miranda Savage, does not provide sufficient expert testimony regarding the allegedly defective condition of the RG5020LD press brake to save the case from summary judgment. Dr. Savage only opines that an OSHA standard was violated when Shaffer, flowing Amada Engineering's procedure, attempted to fix the press brake. But even if the OSHA regulations provide the standard of care for workers such as Mr. Shaffer, Savage's testimony is not helpful to the essential inquiry in this case – whether the product was in a

defective condition when put to a reasonably anticipated use. Savage's testimony regarding Shaffer's working conditions is therefore insufficient to overcome Amada's motion for summary judgment.

V. Conclusion

The opinions and testimony of Dr. Farid Amirouche do not meet the requirements for expert testimony, as set forth in Fed. R .Evid. 702 and Daubert. Without this testimony, there is no evidence that plaintiff can introduce that could prove that the Amada RF5020LD is defective and unreasonably dangerous, and I will therefore grant Amada's motion for summary judgment.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment [#31-1] is granted;

IT IS FURTHER ORDERED that Defendant's Motion in Limine to Exclude the Testimony and Opinions of Dr. Farid Amirouchce [#37-1] is granted;

IT IS FURTHER ORDERED that all other pending motions are denied as moot.

A separate judgment in accord with this Memorandum and Order is entered this same date.

Dated this 6th day of January, 2003.

Catherine D. Perry
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD SHAFFER,	)	
	)	
Plaintiff,	)	
	)	CASE NO:
vs.	)	4:01CV1767 CDP
	)	
AMADA AMERICA, INC.,	)	
	)	
Defendant.	)	

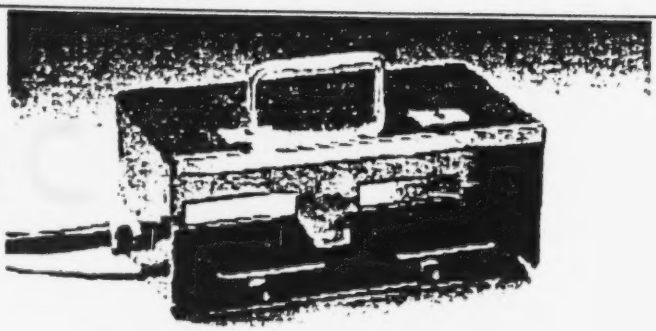
JUDGMENT

In accordance with the Memorandum and Order entered this same date, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that judgment is entered in favor of defendant, that the plaintiff take nothing, that the action be dismissed on the merits, and that defendant recover of plaintiff its costs of this action.

Dated this 6th day of January, 2003

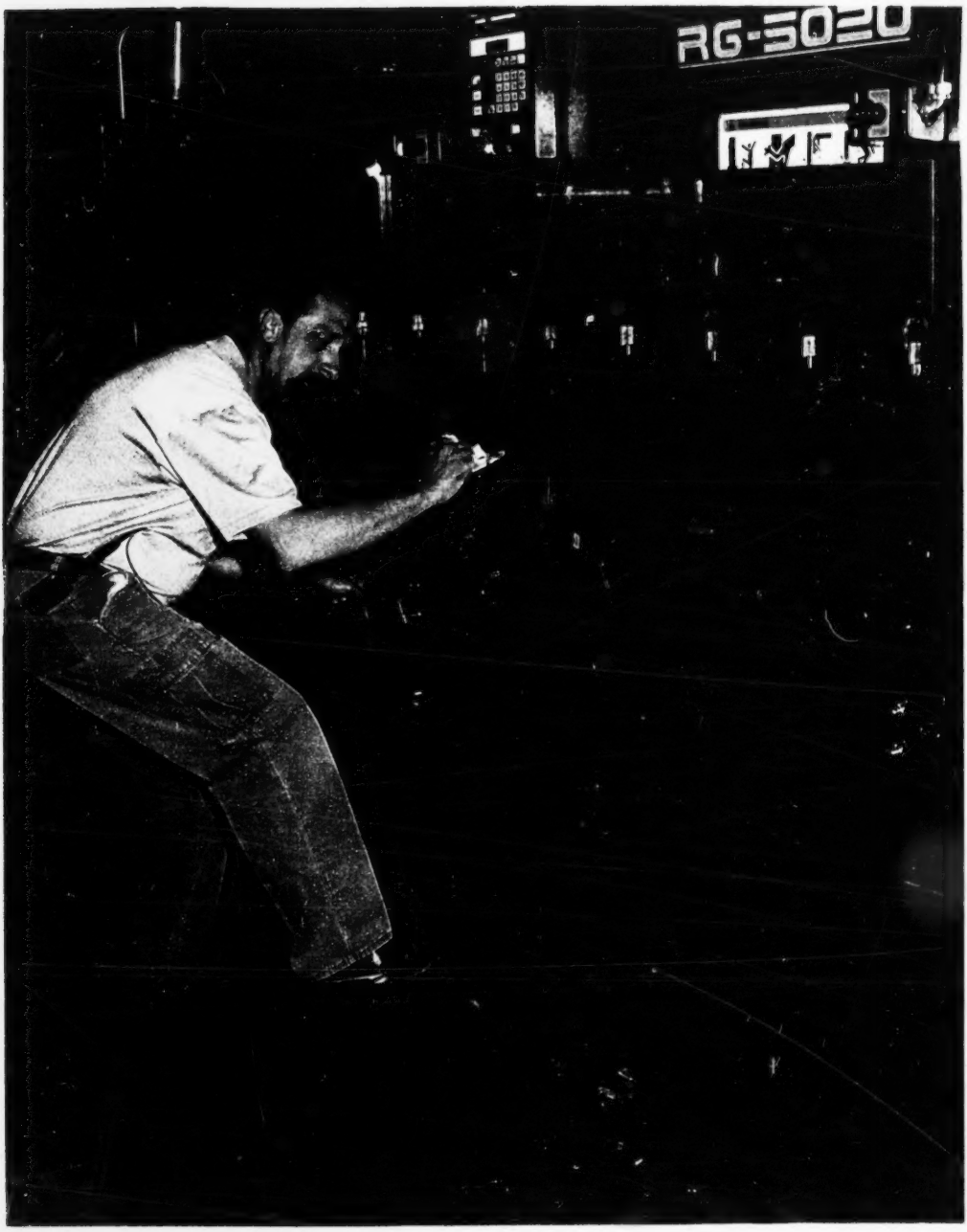
_____
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

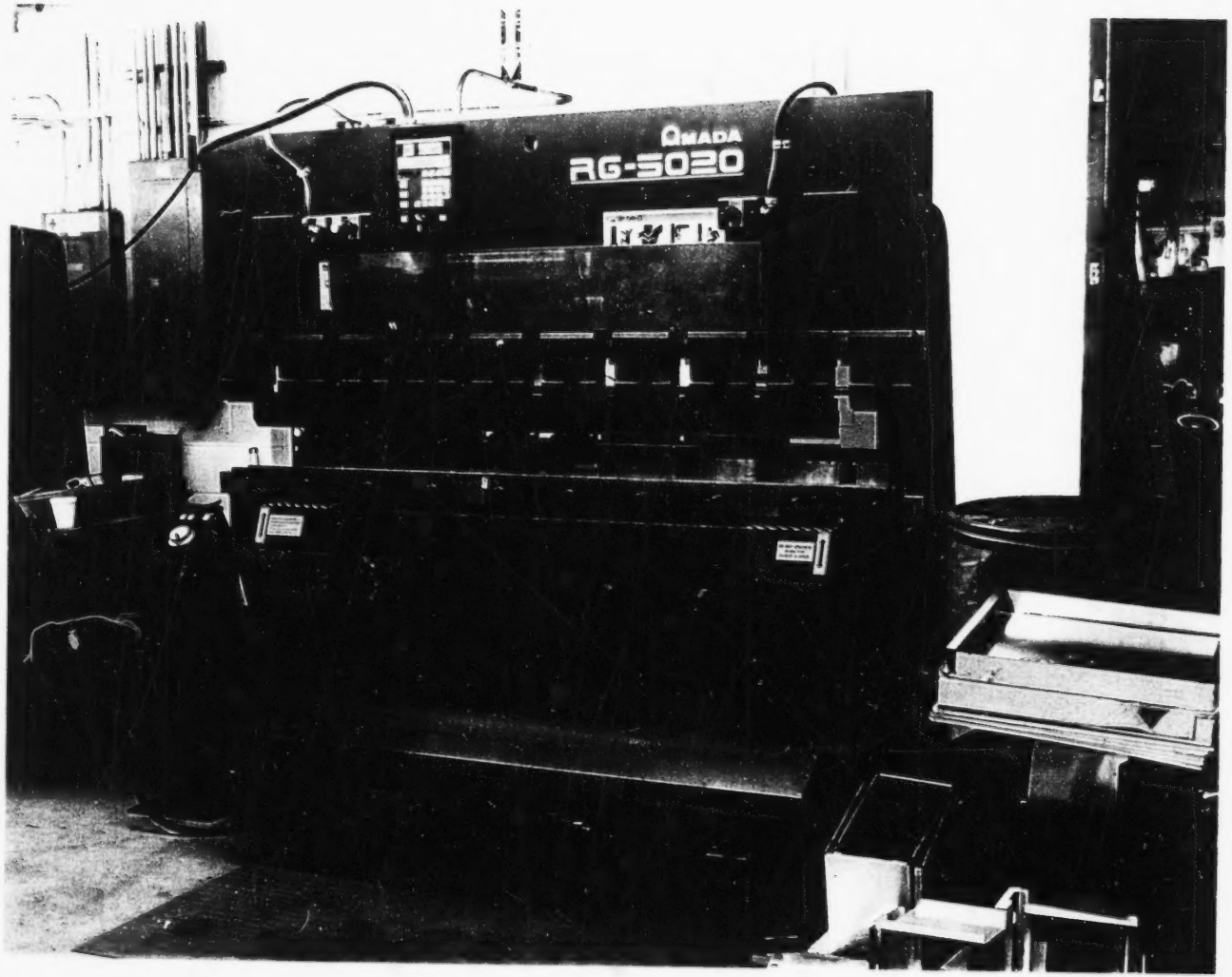
Foot Switches



Amada Engineering stocks a wide array of foot for all press brake models such as RG, FBD and HFB These include retrofit switches which will add versatility to your press brake for staging or Dual Operator operations. Reduce Operator fatigue while increasing safety of the bending operation.

- Locate a Sales Engineer


RG-5020


AMADA
RG-5020

Amada Engineering
& Service Co., Inc.

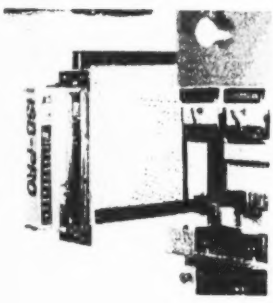
Retrofit Products

Press Brake Safety

Dual Palm Buttons

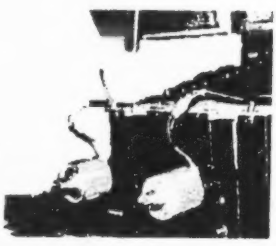
Put safety in the palm of your hand. This two-hands controlled protection system reduces accidents associated with bending operations. In addition it satisfies all OSHA requirements for point of operation guarding. AESI's Dual Palm Buttons allow full ram motion when bending any size part.

ISB Programmable Light Curtains



The ISB Programmable Beam blank-out light curtain is our unique safety solution for Amada press brake guarding. ISB light curtains provide optimum safety with minimum production interruption. The intelligent control system, not the operator, allows the workpiece profile to determine which beams are activated. Safety no longer has to come at the expense of productivity.

Electromagnetic Fingers



These electromagnets are designed to hold the work being formed in the press brake while getting the operator's hands away from the "point of operation" during the forming cycle. A new control feature permits